83-2160

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT LEE ELLIOTT,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a sentencing federal district court strictly comply with the provisions of 21 U.S.C. §851(b) by making personal inquiry of the convicted defendant about alleged prior controlled substance convictions set forth in the government's Information of Prior Convictions, and by personally advising said defendant of those matters and things set forth in the statute before the court may sentence the defendant under the enhanced punishment provisions of 21 U.S.C. §841(b)?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert Lee Elliott, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on May 29, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ____F.2d ____ (4th Cir. 1984), and is reproduced in Appendix A hereto. The Order of the United States District Court for the Middle District of North Carolina is unreported, but is reproduced in Appendix B, hereto. Said Order was filed on May 17, 1983.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit was entered on May 29, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the following portions of the following statutes:

21 U.S.C. §841(b)(B), providing in pertinent part:

> In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall...be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant, or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both.

And 21 U.S.C. §851(b), which provides:

> If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the

person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

STATEMENT OF THE CASE

The petitioner in this case, Robert Lee Elliott, was convicted on December 18, 1981, by a jury in the United States District Court for the Middle District of North Carolina of one count of conspiracy to possess and distribute phenmetrazine hydrochloride (preludin), a schedule II, non-narcotic controlled substance, of two counts of unlawful possession with intent to distribute phenmetrazine hydrochloride, and two counts of distribution of phenmetrazine hydrocholoride, in violation of 21 U.S.C. §§841 and 846. The 5-count indictment on which petitioner was convicted was returned on October 26, 1981. In

November, 1981, before the jury trial, the United States filed an information of prior conviction against Elliott, giving notice to him of the government's intent to seek increased penalties pursuant to 21 U.S.C. §841(b). This information listed a conviction in the District of Columbia for unlawful distribution of heroin on April 3, 1973.

Following his conviction by the jury, the trial court ruled that the unlawful possession with intent to distribute counts merged with the two distribution counts for purposes of sentencing. This ruling left Elliott exposed, without regard to the enhanced penalties provisions of 21 U.S.C. §841(b), to a maximum possible sentence of 15 years, that is, three 5-year sentences. Under the enhanced-penalties provision of 21 U.S.C. §841(b), therefore, Elliott was subject to a maximum possible

imprisonment of twice 15 years or 30 years -- that is, 10 years on each of the three counts of the indictment that were viable for sentencing purposes.

On January 20, 1982, Elliott received the maximum possible imprisonment and fine -- three 10-year sentences to be served consecutively and three $30,000 fines, totalling $90,000. (In addition, two special parole terms of 10 years apiece were imposed.)

At the time of the sentencing hearing on January 20, 1982, the trial court did not inquire of Elliott personally whether he affirmed or denied the prior 1973 conviction, nor did the court inform Elliott that any challenge to the prior conviction not made before sentence was imposed could not thereafter be raised to attack the sentence in the instant case.

By way of a Rule 35 motion, which is

what this petition and the decisions below involve, petitioner Elliott sought to have his sentence vacated on the grounds that it was imposed in an illegal manner, in that the mandate of 21 U.S.C. §851(b) was not followed. The District Court denied petitioner's Rule 35 motion on May 17, 1983 [see Appendix B, infra.] Elliott gave notice of appeal to the Fourth Circuit, which affirmed on May 29, 1984. [see Appendix A, infra.]

At the sentencing hearing conducted in this matter on January 20, 1982, the only inquiry made of Elliott by the Court prior to sentencing was whether he had "anything to offer in mitigation of punishment or as to why judgment should not now be entered." [Trial transcript, p. 516, Court of Appeals Appendix p. 73a.] At no time during the sentencing hearing, or prior thereto, was Elliott asked to affirm

or deny that he had been convicted on April 3, 1973, of unlawful distribution of heroin as alleged in the government's information of prior conviction. However, Elliott's trial attorney during the sentencing hearing did state that Elliott "was convicted in 1973," and at a bond-reduction hearing prior to trial, the attorney acknowleged that Elliott had served time in the District of Columbia. [Trial transcript, pp. 504, 5; Court of Appeals Appendix pp. 70a, 34a.] Also, during the trial, at a bench conference out of the hearing of the jury, Elliott's trial attorney made the statement that he intended to move under Rule 608 of the Federal Rules of Evidence to have Elliott's alleged prior record excluded "upon a showing that he has been completely rehabilitated from his past conviction, and I have copies of his record, his parole record from Washington, D.C." [Trial transcript, p. 236, Court of

Appeals Appendix, p. 43a.]

REASONS FOR GRANTING THE WRIT

CERTIORARI OUGHT TO BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE FOURTH CIRCUIT IN THIS CASE AND PRIOR DECISIONS OF THE FIFTH AND NINTH CIRCUITS.

The question is whether a sentencing court may subject a criminal defendant such as Mr. Elliott to the enhanced punishment provided in 21 U.S.C. §841(b) without strict compliance with 21 U.S.C. §851(b).

The Fourth Circuit has answered the question in the negative. On the other hand, the Fifth and Ninth Circuits have required strict compliance with the provisions of 21 U.S.C. §851(b), before a defendant's sentence may be enhanced. In United States v. Garcia, 526 F.2d 958 (5th Cir. 1976), the defendant himself admitted to the prior conviction during the trial, and the defendant's attorney agreed. At the sentencing hearing, however, the trial court

in Garcia never asked the defendant to affirm or deny the prior conviction, and this was determinative according to the Fifth Circuit. Consequently, Garcia's sentence was vacated and the case was remanded for re-sentencing.

In United States v. Garrett, 565 F.2d 1065 (9th Cir. 1977), rehear, and rehear. in banc den., cert. den., 435 U.S. 974 (1978), the Ninth Circuit stated that "failure to comply with Section 851(b) renders the sentence illegal." 565 F.2d at 1072.

The Fourth Circuit's ruling in the present case can be squared neither with Garcia, nor with Garrett; in its opinion in this case, the Fourth Circuit did not undertake to do so, notwithstanding that petitioner cited both cases in his brief.

In the present case, similar to Garcia, supra, Elliott's trial attorney referred to a prior conviction as pointed

out in the Statement of the Case, supra. However, unlike Garcia, the defendant himself never acknowledged the prior conviction. It must be remembered that in Garcia, the defendant there admitted to the prior conviction at trial. Consequently, it would seem more clear on the fact situation presented in this case that 21 U.S.C. §851(b) was not followed, and hence Elliott was sentenced in an illegal manner, entitling him to relief under Rule 35 of the Federal Rules of Criminal Procedure. (It should be noted that there is no question concerning the timeliness of Elliott's Rule 35 motion. He filed same on March 31, 1983, which was within 120 days of the date the Fourth Circuit affirmed Elliott's direct appeal of the jury conviction, said opinion by the Fourth Circuit on the merits of guilt or innocence having been rendered on December 2, 1982.)

The decision of the Fourth Circuit below presents more than a conflict between the circuits. At issue as well is the construction to be placed upon the seemingly mandatory language of 21 U.S.C. §851(b). As noted by the Fifth Circuit in United States v. Noland, 495 F.2d 529 (5th Cir. 1974), cert. den., 419 U.S. 966, provision for enhanced sentencing is a legislative decision and the procedure the legislature prescribes must be followed. This is so notwithstanding the added burdens the legislation may impose. In speaking of the statutory procedures required in 21 U.S.C. §851(b), the Ninth Circuit in Garrett, supra, stated:

> We do not discount the burden that compliance with §851(b) places on seriously backlogged district courts, but we also recognize that the "quantum jump" in the severity of the sentence (citations omitted) that Congress has forced district courts to impose under this enhancement statute means that a defendant

faces draconian penalties if he has any valid priors.

United States v. Garrett, 565 F.2d 1065.

In the instant case, Elliott received the draconian penalty of 30 years incarceration and a $90,000 fine for selling approximately 200 phenetrazine hydrochloride tablets on one occasion and 400 such tablets 10 days later, with assistance on the second occasion of a co-defendant, which said assistance permitted the government to add a conspiracy count and get a conspiracy conviction. Yet, before being subjected to such draconian penalties for selling a total of 600 diet pills, the statutory mandates of 21 U.S.C. §851(b) were not followed in Elliott's case. The following is the only colloquy between the trial court and Elliott at the sentencing hearing:

> The court...[I] will hear from you before concluding what the sentence will be, so do you have anything

to offer in mitigation of punishment or as to why judgment should not now be entered? I'll be glad to hear from you.

Defendant Elliott: Well, I'm not exactly pleased with this [pre-sentence] report. A lot of it is not so, and I am not as big as they say I am, nothing like that I do a lot that maybe I shouldn't do, trying to help people and do things which I've done all my life, but I imagine if I had found out in other courts what I found out in this court, I probably wouldn't be standing here now. I learned a lot that I wished I had known and I wouldn't be standing here now. That's all.

The Court: All right. Let the record show that the Court determines and concludes that by reason of a prior conviction, the defendant is subject to the increased penalty provided in Title 21, Section 841, et cetera.... (Trial transcript, pp. 516-517, Court of Appeals Appendix, pp. 73a-74a.)

In summary, the record below is not as clear as the Fourth Circuit's opinion seems to indicate. Elliott himself never personally acknowledged the prior conviction. When he was provided with his right of allocution, he indicated that a lot of

the pre-sentence report in his case, which of course contained reference to the prior conviction, "is not so." And, of course, Elliott was never told by the trial court of the information about a prior conviction, including his rights pertaining thereto, and the possibility of waiving those rights by inaction, as spelled out in 21 U.S.C. §851 (b).

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

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APPENDIX A

OPINION OF THE COURT OF APPEALS:

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-6337

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT LEE ELLIOTT, a/k/a/
"BIDDIE",
Appellant

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Eugene A. Gordon, District Court Judge. (C/R No. 81-127-01-D)

Submitted: April 9, 1984

Decided: May 29, 1984

Before RUSSELL and MURNAGHAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

PER CURIAM:

Robert Lee Elliott, a federal prisoner, appeals from the district court's denial of his Motion to Reduce Sentence under Rule 35, Fed. R. Crim. P. Elliott claims that his enhanced sentence was illegal due to non-compliance with 21 U.S.C. § 851. We disagree.

That statute provides, in part, that the district court "shall . . . enquire" of the defendant if he affirms or denies the prior convictions relied on for enhancement. In the instant case, Elliott's attorney admitted the prior convictions three times in open court. Elliott cannot now complain that error was committed as to lack of acknowledgment of prior convictions.

We dispense with oral argument as the record and other materials before this Court indicate that the facts and legal

arguments are adequately presented.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr-81-127-D
	)	
ROBERT LEE ELLIOTT, a/k/a/ "Biddie"	)	O R D E R

The defendant filed a motion March 31, 1983, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for an order correcting the sentence imposed upon him on the grounds that it was imposed in an illegal manner or, in the alternative, for a reduction of the defendant's sentence.

The Court has carefully considered the defendant's motion and the contentions in his memoranda in support thereof, letters to the Court from interested citizens, and the government's response in opposition. It is concluded that the defendant is not entitled, as a matter of law, to have his sentence "corrected" on the grounds that

it was imposed in an illegal manner. Having reconsidered the actual sentence imposed in the light of all the information in the court file, including the opinion and judgment of the Court of Appeals, the Court concludes that there is no justifiable basis for reducing or modifying the defendant's sentence and would not be inclined to do so if he were being re-sentenced; therefore

IT IS ORDERED that the defendant's motion be and the same is denied.

This the 17th day of May, 1983.

s/Eugene A. Gordon
United States District Judge

APPENDIX C

Title 18, United States Code, Rule 35, Federal Rules of Criminal Procedure:

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall consti-

tute a permissible reduction of sentence under this subdivision.

CERTIFICATE OF SERVICE

I, Thomas Franklin Loflin III, a member of the Bar of the Supreme Court of the United States and counsel of record for Robert Lee Elliott, petitioner herein, hereby certify that on June 28, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served copies of the foregoing Petition for Writ of Certiorari on the opposing party as follows:

On The United States of America, Respondent herein, by depositing three copies in the U.S. Post Office in Durham, North Carolina, with first-class postage prepaid, properly addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530, and by depositing three copies in the U.S. Post Office in Durham, North Carolina, with first-class postage prepaid, properly addressed to the Honorable David B. Smith, Assistant United States Attorney, Middle District of North Carolina,

Post Office Box 1858, Greensboro, North Carolina 27402.

I further certify that all parties required to be served have been served.

Dated June 28, 1984.

Thomas Franklin Loflin

THOMAS FRANKLIN LOFLIN III
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No. 83-2160 (2)

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OCTOBER TERM, 1984

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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9pp

QUESTION PRESENTED

Whether petitioner's enhanced sentence imposed under 21 U.S.C. 841(b) should be set aside on the ground that the sentencing court did not inquire, before imposing the sentence, whether petitioner admitted his prior conviction, when petitioner's counsel had previously admitted the conviction and petitioner does not deny its existence or validity.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2160

ROBERT LEE ELLIOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. The petition for a writ of certiorari was filed on June 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on one count of conspiracy to possess and distribute preludin (Count 1), in violation of 21 U.S.C. 841 and 846; two counts of unlawful possession with intent to distribute preludin (Counts 2 and 4), in violation of 21 U.S.C. 841(a)(1); and two counts of distributing preludin (Counts 3

and 5), in violation of 21 U.S.C. 841(a)(1). The trial court ruled that each possession count merged with a distribution count. Because petitioner had previously been convicted of a drug-related offence, his sentences were enhanced pursuant to 21 U.S.C. 841(b)(1)(B), and the district court imposed three consecutive sentences of 10 years' imprisonment, together with $90,000 in fines. Petitioner was also sentenced to 10 years' special parole on merged Counts 2 and 3 and a consecutive term of 10 years' special parole on merged Counts 4 and 5.

1. In November 1981, prior to trial, the government filed an information against petitioner, pursuant to 21 U.S.C. 841(b) and 851, requesting an increased sentenced in the event of conviction on the ground that petitioner had, on April 3, 1973, been convicted in the District of Columbia of the unlawful distribution of heroin, in violation of 21 U.S.C. 841 (C.A. App. 6a). During argument at a bail reduction hearing, petitioner's attorney acknowledged petitioner's prior conviction, informing the court that petitioner "did serve some time in 1973 in Washington, D.C., for felonious violation of the distribution of heroin" (*id.* at 34a) and that petitioner, in an earlier bail hearing before a magistrate, "took the stand and admitted he served the time" (*id.* at 35a). In denying petitioner's request for bail reduction, the district court noted, among other things, that petitioner's prior conviction enhanced the maximum penalties he could incur (C.A. App. 8a-9a).

At trial, petitioner's attorney again referred to petitioner's prior conviction and successfully argued that it was not a proper subject for cross-examination in light of the fact that petitioner had received a certificate of rehabilitation (C.A. App. 47a-64a). At sentencing, petitioner's attorney challenged various matters contained in the presentence report but agreed that petitioner was convicted in 1973 on a narcotics charge; petitioner's counsel stated: "Now, judge,

he was convicted in 1973 and he admits the conviction and he served his time" (*id.* at 70a). Before imposing sentence, the district court asked whether petitioner wished to address the court; petitioner urged that the presentence report made him appear to be a more important drug dealer than he was, but petitioner did not intimate that his counsel was inaccurate in attributing to him an admission to the prior offense (*id.* at 73a-74a). The court, after stating that petitioner was subject to an increased penalty because of the prior conviction, imposed sentence (*ibid.*), and petitioner's attorney subsequently advised the court that there was no technical problem with the sentence (*id.* at 75a). The court of appeals affirmed the conviction. *United States* v. *Elliott*, 696 F.2d 992 (4th Cir. 1982) (Table).

2. Petitioner subsequently filed a motion under Fed. R. Crim. P. 35, seeking to correct his sentence. Petitioner challenged his sentence on the ground that the court had violated 21 U.S.C. 851(b) by failing to ask him whether he affirmed or denied his prior conviction. The district court denied the motion (Pet. App. 1b-2b), and the court of appeals affirmed (*id.* at 1a-3a). It noted that petitioner's attorney "admitted the prior conviction[] three times in open court" and held that petitioner accordingly could not complain that "error was committed as to lack of acknowledgment of prior convictions" (*id.* at 2a).

ARGUMENT

21 U.S.C. 851(b) specifies that if the United States Attorney files an information seeking an enhanced sentence on the basis of a prior conviction, the sentencing court "shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be

raised to attack the sentence." Petitioner is correct in asserting that the district court failed to comply with this provision. But petitioner does not suggest that he was prejudiced by this failure in any way. Petitioner acknowledges (Pet. 8) that his attorney admitted three times that he had in fact been convicted of the offense described in the information; as we noted, petitioner's attorney stated that petitioner himself testified that he had been convicted of that offense. Petitioner does not deny that he was convicted of that offense; nor does he suggest that he is seeking to challenge that conviction. In short, petitioner does not suggest that, had the district court asked, he would have done anything other than affirm the prior conviction. In addition, because the offense specified in the information occurred more than five years before the information was filed, it appears that 21 U.S.C. 851(e) barred petitioner from challenging it in this case.

The district court's error therefore was plainly harmless, and petitioner does not suggest any reason why a harmless error rule should not apply to a failure to comply with 21 U.S.C. 851(b). See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). See, *e.g.*, *United States* v. *Scales*, 249 F.2d 368, 370 (7th Cir. 1957), cert. denied, 356 U.S. 945 (1958). Petitioner relies on *United States* v. *Garcia*, 526 F.2d 958 (5th Cir. 1976), and *United States* v. *Garrett*, 565 F.2d 1065 (9th Cir. 1977), cert. denied, 435 U.S. 974 (1978). But the holding in *Garcia* was based on the court of appeals' conclusion that there was confusion about which offense was charged as the prior conviction; the court suggested that "substantial compliance" with Section 851(b) — as opposed to the strict, ritualistic compliance urged by petitioner — would be sufficient in the absence of such confusion (see 526 F.2d at 961). The Ninth Circuit has explained that the holding in *Garrett* is based on a similar concern. See *United States* v. *Harris*, 592 F.2d 1058, 1061 (1979). In any event, the Fifth and

have, in cases subsequent to *Garcia* and *Garrett* that involved facts similar to those of the present case, applied a harmless error principle to uphold an enhanced sentence imposed without the inquiry required by Section 851(b). *United States* v. *Nanez*, 694 F.2d 405, 412-413 (5th Cir. 1982) (distinguishing *Garcia* on the ground that in *Nanez*, as in the present case, a challenge to the prior conviction would have been barred by 21 U.S.C. 851(e)); *Harris*, 592 F.2d at 1060-1061. See also *Hardy* v. *United States*, 691 F.2d 39, 41 (1st Cir. 1982) ("Strict compliance with some provisions of the statute may sometimes be dispensed with. See *United States* v. *Harris*, [*supra*].").[1]

If this case were remanded for resentencing — the only relief to which petitioner could possibly be entitled — the sentencing judge would have no information whatever that he did not have at the time he imposed the sentence petitioner now challenges. All that would occur in the resentencing proceeding is that petitioner would explicitly affirm that which he had previously affirmed to the district judge through counsel — the existence of his prior conviction. The only conceivable purpose of such an apparently pointless remand would be the didactic one of encouraging district judges to follow Section 851(b) closely, so as to avoid possible claims by defendants that they were not permitted to deny the existence or validity of prior convictions that were the basis for the enhancement of a sentence. Even assuming arguendo that such an exercise of the supervisory power could ever be warranted, there is no reason for this Court to take such action when the court of appeals did not consider it appropriate.

---

[1]Petitioner does not cite *United States* v. *Ramsey*, 655 F.2d 398 (D.C. Cir. 1981), where the court remarked in a footnote, without explanation, that "strict compliance with 21 U.S.C. § 851(b) is required[;] substantial compliance is not sufficient." 655 F.2d at 400 n.7. But as the court also recognized (*ibid.*), that remark is dictum, because the sentence at issue in *Ramsey* was upheld.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STEPHEN S. TROTT
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NOVEMBER 1984

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